

No. SC 84581

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IN THE SUPREME COURT  
OF THE  
STATE OF MISSOURI

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STATE EX REL. DANIEL BAHRENBURG,

Relator

v.

THE HONORABLE GLEN DIETRICH,  
Nodaway County Associate Circuit Judge

and

THE DIRECTOR OF REVENUE,

Respondents

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**BRIEF OF RESPONDENT DIETRICH**

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David A. Baird 27226  
Office of the Prosecuting Attorney  
305 North Main, Suite 203  
Maryville, MO 64468  
Telephone: (660) 582-8285  
Fax: (660) 582-5499

ATTORNEY FOR RESPONDENT DIETRICH

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## **JURISDICTIONAL STATEMENT**

Respondent adopts the Jurisdictional Statement filed by Relator herein, although specifically noting that Relator previously sought and was denied a Writ of Prohibition from the Missouri Court of Appeals, Western District on the same issues.

### **STATEMENT OF FACTS**

Respondent notes that the Statement of Facts submitted by Relator differs slightly from the recitation contended by Respondent. Respondent would therefore adopt the Statement of Facts by Relator except as challenged in the following modification.

On April 4, 2002, officers from the Maryville Public Safety Department responded to the apartment of Relator. For some inexplicable reason, Relator's summons only reflected the offense of possession of drug paraphernalia, (Ex 4-1) although the two co-defendants received citations alleging misdemeanor possession of marijuana.

After reviewing the reports, the Prosecuting Attorney filed a formal, two-count Information, charging Relator with both possession of a controlled substance, marijuana, and with possession of drug paraphernalia with intent to use. The summons was never forwarded to or filed with the Court, but rather the Information was filed as the sole charging document. (Ex 4-2).

On May 7, 2002, Relator appeared before the Court for his scheduled arraignment, and the Court provided Relator his copy of the Information, charging the two separate offenses. Following discussions and negotiations between the parties, Relator submitted a written guilty plea (Ex 1-C) and written probation order to the Court for its approval. The documents executed by Relator before the Court memorialized the plea agreement reached and submitted to the Court for its approval.

By the terms of the plea agreement, which were subsequently approved by the Court, Relator entered a plea of guilty to the marijuana possession charge and the paraphernalia possession charge was dismissed. The parties acknowledge that prior to his plea, Relator was not informed by the Court of the ramifications of the provisions of Section 577.500, RSMo, and the documents executed by Relator did not reflect any reference to that statutory provision or its potential impact on Relator's driving privilege. Relator was advised of the impact on his driving privilege by the Court Clerk immediately following the acceptance of his plea of guilty to the marijuana possession offense. (Ex 1-A); (Relator's Brief-11).

Subsequent to his plea to the possession charge on May 7, 2002, Relator retained the services of counsel and on May 9, 2002, a Motion to Set Aside Guilty Plea was filed with the Court. Alleging that the Court had failed to advise Relator of the charges against him, had failed to advise Relator of his Constitutional rights, had failed to inform Relator of the range of punishment and had failed to advise Relator that a plea could result in loss of driving privileges because Relator was under 21 years of age, the Motion sought the judicial relief of setting aside the May 7, 2002, plea of guilty.

Relator's Motion was heard by the Court on May 14, 2002, and on May 17, 2002, the Court issued its ruling denying Relator's Motion. Subsequent thereto, Relator filed his Petition seeking mandamus from the Missouri Court of Appeals, Western District, which was subsequently denied. Relator then filed a Motion For Leave of Court to File Notice of Appeal Out of Time, which was denied by the Western District. Relator subsequently filed this action in the Missouri Supreme Court.

## **POINTS RELIED ON**

### **ARGUMENT I.**

**THE RULING OF THE HONORABLE GLEN DIETRICH TO DENY THE MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY SHOULD NOT BE DISTURBED BECAUSE RELATOR WAS PROVIDED DUE PROCESS AS REQUIRED BY LAW IN THAT RELATOR WAS ADEQUATELY ADVISED OF ALL CHARGES AGAINST HIM IN COMPLIANCE WITH MISSOURI SUPREME COURT RULE.**

*State v. Hasan*, 806 S.W.2d 54 (Mo.App.W.D. 1991).

Missouri Supreme Court Rule 24.02.

### **ARGUMENT II.**

**THE DECISION OF THE HONORABLE GLEN DIETRICH TO DENY THE MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY WAS CORRECT BECAUSE THE RELATOR ENTERED A KNOWING PLEA IN THAT RELATOR WAS NOT REQUIRED TO BE ADVISED OF THE POTENTIAL LOSS OF DRIVING PRIVILEGES AS SUCH IS ONLY A COLLATERAL CONSEQUENCE OF SUCH PLEA.**

*State v. Hasan*, 806 S.W.2d 54 (Mo.App.W.D. 1991).

*Winford v. State*, 453 S.W.2d 43 (Mo.banc 1972).

*Latham v. State*, 439 S.W.2d 739 (Mo. 1969).

*State v. Abernathy*, 764 S.W.2d 514 (Mo.App.S.D. 1989).

Missouri Supreme Court Rule 24.02(b).

### **ARGUMENT III.**

**THE HONORABLE GLEN DIETRICH CORRECTLY NOTIFIED THE DIRECTOR OF REVENUE OF RELATOR'S PLEA OF GUILTY BECAUSE THERE WAS COMPETENT EVIDENCE PRESENTED TO THE COURT OF VIOLATION OF SECTION 577.500, RSMo IN THAT RELATOR VOLUNTARILY ENTERED A PLEA OF GUILTY TO POSSESSION OF MARIJUANA WHILE UNDER TWENTY-ONE YEARS OF AGE.**

*State ex rel. Lee v. Bailey*, 817 S.W.2d 287 (Mo.App.S.D. 1991).

*State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo.banc 1997).

Section 577.500, RSMo .

## **ARGUMENT I.**

### **THE RULING OF THE HONORABLE GLEN DIETRICH TO DENY THE MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY SHOULD NOT BE DISTURBED BECAUSE RELATOR WAS PROVIDED DUE PROCESS AS REQUIRED BY LAW IN THAT RELATOR WAS ADEQUATELY ADVISED OF ALL CHARGES AGAINST HIM IN COMPLIANCE WITH MISSOURI SUPREME COURT RULE.**

In his Argument I, Relator misstates facts which are relevant to this particular case and the application of criminal procedure. The first and only document to charge the Respondent with a criminal offense in this cause was a two-count Information filed by the Prosecuting Attorney. (Ex 4-2). Clearly, notwithstanding Relator's argument, law enforcement officers have neither the authority nor power to issue charges, and the document that Relator denominates as the initial charging document was simply a summons requiring Relator to appear in Court. At the time Relator made his initial appearance in Court, he was advised that a formal Information had been filed, charging Relator in two counts. Relator was therefore adequately advised of the initial charges of one count of misdemeanor possession of marijuana and one count of misdemeanor possession of drug paraphernalia.

Additionally, Relator clearly understood the charges against him in that he stood before the Court and filed his written Petition to Enter a Plea of Guilty wherein he acknowledged that he was entering a plea of guilty to the marijuana charge. (Ex 1-C). Thus, notwithstanding Relator's argument of Relator. Relator was aware of the charges against him, the ranges of punishment, the plea agreement that had been reached (which included dismissal of one count) and the ramifications of the plea of guilty related to probation. As further related in this Brief, while Relator was not advised by the Court of the potential loss of driving privileges, Respondent was not required to do so in that the same is a collateral consequence of the plea of guilty. *State v. Hasan*, 806 S.W.2d 54 (Mo.App.W.D. 1991).

Thus, the Court complied with all due process requirements in that Relator was advised of the charges against him, advised of the ranges of punishment, and advised of the other rights required by Missouri Supreme Court Rule 24.02. (Ex 1-C). With those rights in mind, Relator made the knowing decision to enter a plea of guilty and so advised the Court, filing his written petition. Therefore, mandamus is not appropriate to direct Respondent to set aside guilty plea in that Relator was fully advised of the charges against him.

For all of the foregoing reasons, the decision by the trial court was justified as a matter of law, and mandamus should not issue.

## **ARGUMENT II.**

**THE DECISION OF THE HONORABLE GLEN DIETRICH TO DENY THE MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY WAS CORRECT BECAUSE THE RELATOR ENTERED A KNOWING PLEA IN THAT RELATOR WAS NOT REQUIRED TO BE ADVISED OF THE POTENTIAL LOSS OF DRIVING PRIVILEGES AS SUCH IS ONLY A COLLATERAL CONSEQUENCE OF SUCH PLEA.**  
**ARGUMENT II.**

In his Arguments II and III, Relator contends that Relator's plea of guilty should have been set aside by the trial court because Relator was not advised that his plea of guilty to the charge of misdemeanor possession of marijuana would result in suspension of his driving privileges. Notwithstanding Relator's argument, the issues in this case are not whether the trial court could have set aside the guilty plea, nor whether a decision to set aside the guilty plea would have been "reasonable" (Relator's Brief-41) or would have caused "little inconvenience" (Relator's Brief-27), but rather whether Relator was entitled to have his plea of guilty set aside as a matter of law.

Notwithstanding Relator's arguments based upon an intertwined positions of equity and sympathy, the law clearly supports the determination and decision of the trial judge that Relator was not legally entitled to set aside his guilty plea, in that Relator was fully advised of all of his rights and of the direct consequences of the plea prior to the entry of his plea of guilty. Upon the evidence submitted, the ruling of the Court on May 17, 2002, denying Relator's request was correct as a matter of law, and mandamus directing the trial court to set aside the plea of Relator should not issue.

The documents substantiate that prior to entering his plea of guilty, Relator was informed of all elements required by Missouri Supreme Court Rule 24.02(b). (Ex 1-C). Additionally, Relator had been arraigned by the Court, had been provided a copy of the

charges filed against him, and was aware of the nature of charges as reflected in his plea petition. Thus, Relator knowingly entered his plea of guilty before the Court.

A defendant is not vested with an absolute right to withdraw a previously entered plea of guilty. *State v. Mandel*, 837 S.W.2d 541 (Mo.App. 1992); *State v. Pendleton*, 910 S.W.2d 268 (Mo.App.W.D. 1995). Rather, in order to substantiate entitlement to withdraw his plea, a defendant must establish specific grounds of manifest injustice to warrant the relief. *State v. Hasan*, 806 S.W.2d 54 (Mo.App. 1991). In *Winford v. State*, the Missouri Supreme Court held that if a defendant enters a voluntary plea of guilty with an understanding of the charges against him, there is not manifest injustice warranting the withdrawal of the plea. 485 S.W.2d 43 (Mo.banc 1972).

In order to justify an order setting aside the previously-entered plea, the movant must establish that he was “misled or induced to enter a plea of guilty by fraud, mistake, misapprehension, coercion, duress or fear”. *Latham v. State*, 439 S.W.2d 737, 739 (Mo. 1969). In the matter now before the Court, Relator failed to establish and the evidence refutes each of the foregoing grounds. Specifically, Relator waived his right to counsel in writing and entered a voluntary plea. (Ex 1-C). The documents executed by Relator and approved by the trial court specifically advised Relator of all direct consequences of his plea, all in conformity with Missouri Supreme Court Rule 24.02(b). Because Relator failed to establish any “false-promise” or “mental-pressure” grounds as enumerated by the Court in *Latham, supra*, the plea was voluntary and the trial court’s decision to deny Relator’s prayer for relief was correct.

Relator contends that mandamus will lie because Respondent failed to specifically advise Relator of the ramifications of Section 577.500, RSMo in advance of the plea, and the

failure of Respondent to do so renders the plea involuntary. However, there is no requirement that a court advise a defendant of *collateral* consequences which result from his entry of a plea of guilty, and the failure to advise a defendant of collateral consequences does not render the plea involuntary. *State v. Hasan, supra*.

In its ruling, the Court in *Hasan* noted that the process to be followed in deciding whether an action is a direct or collateral consequence is to determine whether the consequence can be reasonably found to be included or described in the language of Rule 24.02(b). In this instance, there is no construction or reading of Rule 24.02(b) which would include the subsequent loss of driving privileges by the State licensing authority as a *direct* consequence of a guilty plea. As the Court also noted in referencing the Rule, “given the mandatory nature of this Rule, it is also logical to conclude that **this list is exclusive and that all “direct” results are stated therein.**” *Hasan*, at page 56, emphasis added.

Additionally, in defining matters included in *collateral* consequences of a plea of guilty, the Court of Appeals stated as follows:

As for the collateral consequences of which the defendant need not be warned, they include such matters as the diminished reputation or other adverse social consequences which may follow conviction, loss of the right to vote, loss of a passport and the opportunity to travel abroad, and **loss of a business license or driver’s license.** *State v. Abernathy*, 764 S.W.2d 514, 516 (Mo.App.S.D. 1989), emphasis added.

Notwithstanding the pronouncements in *Hasan* and *Abernathy*, and that the loss of driving privilege is not included in or alluded to in Rule 24.02(b), Relator contends that the trial court was required to advise Relator of the impact of Section 577.500, RSMo. However, by implementing the position of Relator, in addition to other warnings courts



would be required to advise defendants of every consequence to their driving privilege on every plea. This would include not only ramifications from a plea in a driving while intoxicated or driving while revoked case, since loss of license is mandatory, but also a plea to a speeding case would require the Court to advise the defendant of the license privilege ramifications, since the plea of guilty would have automatic license implications to any defendant who already had accrued sufficient points. Thus, application of Relator's position would effectively render almost every guilty plea involuntary, and no finality would exist.

The position of Relator is not supported by the case law nor court rule, and implications upon Relator's privilege to drive is a collateral consequence as noted in *Abernathy*. The notification document executed by Respondent (Ex K) specifically provides that any suspension of Relator's driving privilege shall occur "as determined by the Director of the Department of Revenue." Additionally, it is noted that the plea forms promulgated by the Missouri Supreme Court do not include disclosures related to loss of driving privileges and/or assessment of points in the document.

Thus, Relator failed to meet his burden of proof and Respondent had properly advised Relator of all direct consequences of the plea. Relator was not entitled to withdraw his plea of guilty and mandamus will not lie to mandate the Court to set aside the Relator's plea of guilty because mandamus is appropriate only when there is a clear, unequivocal and specific right. *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo.banc 1997). Under the law, Respondent correctly and properly advised Relator of all direct consequences of his plea of guilty and Relator has neither a clear nor unequivocal right to withdraw his plea.

For all of the foregoing reasons, the decision by the trial court was justified as a matter of law and mandamus should not issue.

### **ARGUMENT III.**

**THE HONORABLE GLENDIETRICH CORRECTLY NOTIFIED THE DIRECTOR OF REVENUE OF RELATOR'S PLEA OF GUILTY BECAUSE THERE WAS COMPETENT EVIDENCE PRESENTED TO THE COURT OF VIOLATION OF SECTION 577.500, RSMo IN THAT RELATOR VOLUNTARILY ENTERED A PLEA OF GUILTY TO POSSESSION OF MARIJUANA WHILE UNDER TWENTY-ONE YEARS OF AGE.**

In Argument III, Relator contends that the order directing the Missouri Director of Revenue to suspend Relator's driving privileges should be set aside for the same failure to give notice to Relator. First, this issue is not properly before the Court, in that Relator did not raise nor preserve this issue before the trial court. Additionally, notwithstanding Relator's argument, the issues in this case are not whether the trial court could have set aside its notification to the Director of Revenue, but rather whether the Relator was entitled to relief as a matter of law.

Upon the acceptance by the Court of the voluntary plea of guilty by Relator to the criminal charge of misdemeanor possession of marijuana, the provisions of Section 577.500, RSMo, became applicable. Thereupon, in compliance with that statutory provision, the Court issued notification to the Missouri Department of Revenue to commence the process for suspension of Relator's driving privilege. Relator contends that the Court should issue its Writ directing Respondent to set aside this notification resulting in suspension of Relator's privilege to drive. In that analysis, Relator contends that the plea of guilty by

Relator to possession of marijuana did not warrant the suspension, arguing that additional evidence was required before Respondent could so act.

Unlike the issue raised in *State ex rel. Lee v. Bailey*, 817 S.W.2d 287 (Mo.App.S.D. 1991), cited by Relator, the suspension of Relator's driving privileges as initiated by Respondent was mandated solely by Relator's plea of guilty to the criminal offense. Relator contends that additional proof was required before Respondent could issue his order notifying the Director of the Department of Revenue of the plea.

In the case cited by Relator, the Court held that the loss of driving privilege could only occur if Lee entered a plea to the criminal offense **AND the possession occurred while Lee was operating a motor vehicle**. Following Lee's plea, the trial court ordered notification of suspension of license. In that case, the Court of Appeals ordered the Writ of Mandamus be made absolute in order to allow the trial court to determine "whether the offense . . . occurred while operating a motor vehicle". *Lee*, at page 289.

The factors which led to that result are not applicable to this case. Unlike the circumstances in *Lee*, there is no additional evidence required before the Court could issue its order notifying the Director to suspend Relator's driving privilege. In *Lee* the defendant could have committed the criminal offense while operating a motor vehicle (causing the suspension order to issue), or he could have committed it when he was not operating a motor vehicle (in which case no suspension would occur). Thus, the plea of guilty alone was not sufficient to warrant suspension of the license; rather the Court was required to make a determination as to the second element prior to issuing the suspension notification.

In this cause, the plea of guilty alone mandated the Court to issue the suspension

notification. Unlike in *Lee*, Relator could not have committed the criminal offense of possession of marijuana on April 22, 2002, without violating Section 577.500, RSMo, because the age of Relator could not change. Unlike the circumstances in *Lee*, every marijuana possession which Relator committed on that date would trigger the notification process because it was impossible for Relator to commit that offense when over 21 years of age on that date. Additionally, the Court had competent evidence before it to establish Relator's age at the time of the offense. This evidence included the bond sheet signed by Relator establishing his date of birth<sup>3</sup> and the document completed by Relator and the Court Clerk following the plea acknowledging he was less than 21 years of age (Ex K).

Thus, upon accepting the plea of guilty to possession of marijuana by Relator who was under 21 years of age, the trial court was mandated by statute to issue notification for suspension of driving privilege of Relator. Therefore, mandamus will not lie because mandamus is appropriate only when there is a clear, unequivocal and specific right. *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445 (Mo.banc 1997).

For all of the foregoing reasons, the decision by the trial court was justified as a matter of law and mandamus should not issue.

## **CONCLUSION**

For all of the foregoing reasons, Respondent contends that the determinations at the trial level were correct, and Relator's Application for Mandamus should be denied.

Respectfully submitted,

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David A. Baird 27226  
Prosecuting Attorney  
Nodaway County Courthouse  
305 North Main, Suite 203  
Maryville, MO 64468

ATTORNEY FOR RESPONDENT DIETRICH